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Placing a Round Peg into a Square Hole: The Third Circuit Applies ERISA to Hybrid Pension Plans in Register v. PNC

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"PLACING A ROUND PEG INTO A SQUARE HOLE":[1] THE THIRD CIRCUIT APPLIES ERISA TO HYBRID PENSION PLANS IN *REGISTER v. PNC*

I. INTRODUCTION

IN 1974, after more than a decade of debate and public pressure, Congress passed the Employee Retirement Income Security Act (ERISA)—the federal government's first attempt to regulate employer-provided pension plans.[2] As originally enacted, ERISA provided stability and security to employees by restricting practices such as allocation of benefits based disproportionately on workers' ages or terms of service.[3] Congress accomplished this by narrowly tailoring ERISA's prohibitions to the two forms of pension plans prevalent among private employers in 1974: "defined contribution plans" and "defined benefit plans."[4] Until very recently, ERISA

1. Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 63 (3d Cir. 2007).

2. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. § 1001 (2006)) (establishing regulatory framework over private, employer-provided pension plans). Although some commentators point out that the true roots of ERISA reach back nearly one hundred years, it was not until the 1960s that pension abuse became a prominent issue of national concern. *See* David N. Levine & August A. Imholtz, III, *Introduction* to ERISA: A COMPREHENSIVE GUIDE 1-3 to 1-7 (Paul J. Schneider & Brian M. Pinheiro eds., 2008) (explaining issues concerning private pensions, beginning in 1875, but noting that pension stability and reform did not receive major attention from United States government until John F. Kennedy's election as President in 1960). Throughout the early 1970s, New York Senator Jacob Javits led a reform movement that ultimately culminated in the enactment of ERISA. *See id.* at 1-7 (discussing process of hearings and proposals that brought attention to cause of pension regulation).

3. *See id.* at 1-8 (discussing worker protections contained in ERISA). Other provisions directed towards this end were added to ERISA in 1986. *See* Pub. L. No. 99-506, § 9201, 100 Stat. 1874 (1986) (prohibiting cessation or decrease in rate of increase in employees' accrued pension benefits, or conversely, decrease in employer contributions to employees' accounts, dependent on form of private pension, due to employees' age); Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 638 (7th Cir. 2006) (discussing ERISA's prohibitions on age discrimination, based on form of employers' pension plan).

4. *See* 29 U.S.C. § 1054(a) (2006) (classifying all private pension plans as one of two possible forms, each of which is subject to specific requirements); *see also* 29

has remained substantially unaltered on this point.[5] The complex field of employer-provided pension plans, however, has not.[6]

Beginning in the 1980s and continuing into the next two decades, many employers developed a third type of pension plan that combines attributes of the two previously familiar types.[7] This third type, known as a

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U.S.C. §§ 1002(34), 1002(35) (2006) (defining "defined benefit plan" as "a pension plan other than a[ ] [defined contribution plan]"); Esden v. Bank of Boston, 229 F.3d 154, 159 n.6 (2d Cir. 2000) (characterizing federal pension regulation as "rigidly binary"). For a detailed discussion of these two forms of plans and the consequences of ERISA's original binary structure, see *infra* notes 17-25 and accompanying text.

In order to prevent age discrimination, ERISA prohibits employers that provide defined contribution plans from increasing or decreasing their contributions to employees' accounts based on employees' ages. *See* 29 U.S.C. § 1054(b)(2)(A) (prohibiting employer from ceasing or decreasing contributions to individual accounts because of employees' ages). Employers that provide defined benefit plans are prohibited from causing their employees' benefits—that is, actual receipts rather than employer contributions—to cease or decrease on account of age. *See* 29 U.S.C. § 1054(b)(1)(H)(i) (prohibiting age discrimination by employers that would cause actual employee receipts to cease or decrease on account of age); *Register*, 477 F.3d at 64 (discussing ERISA's different anti-age-discrimination requirements for different forms of plans).

5. *See Register*, 477 F.3d at 65 n.8 (noting that Congress recently attempted to adapt federal regulatory framework by enacting rules specifically tailored for third form of pension plan); *Cooper*, 457 F.3d at 638 (discussing 1986 amendments to ERISA that did not change overall classification of pension plans); *Esden*, 229 F.3d at 159 n.6 (discussing "rigid[ ]" nature of regulatory framework despite changes in industry); *see also* Pension Protection Act of 2006, Pub. L. No. 109-280, § 701 (codified as amended at 29 U.S.C. § 1054(b) (2006)) (providing special anti-age-discrimination rules for third form of pension plan). For a detailed discussion of the Pension Protection Act of 2006 and its potential impact on the controversy addressed in *Register*, see *infra* notes 113-231 and accompanying text.

6. *See* Eaton v. Onan Corp., 117 F. Supp. 2d 812, 817-18 (S.D. Ind. 2000) (describing innovations of third form of pension plan, controversy surrounding plans and government's initial response); Barry Kozak & Joshua Waldbeser, *Much Ado about the Meaning of "Benefit Accrual": The Issue of Age Discrimination in Hybrid Cash Balance Plan Qualification Is Dying but Not Yet Dead*, 40 J. MARSHALL L. REV. 867, 868 (2007) (discussing development of new form of pension plan in 1980s and 1990s and regulation of these plans by ERISA). Beginning in 1985, private employers began using a third form of plan that they believed would help attract younger workers. That move angered many older workers who were then enrolled in one of the two traditional forms of plans. *See Eaton*, 117 F. Supp. 2d at 818 (discussing development of hybrid plans and eventual need for courts to consider legality of such plans as applied to older workers). For an extended discussion of this third form of pension plans and the state of the controversy surrounding them, see *infra* notes 17-38 and accompanying text.

7. *See Eaton*, 117 F. Supp. 2d at 818 (noting first use of third form of plans and their "hybrid" nature); *see also Esden*, 229 F.3d at 158-59 (discussing nature of hybrid plans, as well as costs and benefits they provide to employers). Hybrid plans combine attributes of both defined contribution plans and defined benefit plans. *See Esden*, 229 F.3d at 158-59 (discussing attributes of plans, relative to those of older forms of plan). Specifically, hybrid plans have individual—albeit hypothetical—accounts for each employee, like defined contribution plans. Like defined benefit plans, however, the accounts do not actually vest to employees, and benefits are drawn from the employer's collected assets. *See Register*, 477 F.3d at 63

"hybrid" or "cash balance" plan, offers the possibility of flexibility for employers, as well as autonomy and security for employees, in levels not available in the two traditional plans.[8] Yet, hybrid plans also come with a distinct disadvantage to employers seeking to revamp their pension systems: ERISA's 1974 authors never contemplated if or how the statute's various prohibitions affected these then-unknown pension plans.[9] In recent years, the task of interpreting ERISA's impact on this third type of plan has fallen to the federal courts and, most recently, the Court of Appeals for the Third Circuit in *Register v. PNC Financial Services Group, Inc.*[10]

(discussing hybrid nature of plans and benefits they provide employers); *Esden*, 229 F.3d at 158-59 (describing attributes of hybrid plan).

8. *See Register*, 477 F.3d at 63 (explaining benefits of hybrid plans). In these plans, employees draw benefits from employer contributions and interest credits gained over time. *See id.* (explaining dual methods of funding plans). Upon retirement, employees typically may choose a form of payment that gives them the greatest combined benefits from the two. *See id.* (discussing flexibility for employees under plans). Some believe that this flexibility is particularly important to younger workers who, unlike their older counterparts, may foresee changes in their employers over time. *See Eaton*, 117 F. Supp. 2d at 818 (discussing advantages of hybrid plans that are attractive to employers and employees). Courts have noted that cash balance plans became popular in response to a volatile 1980s stock market, in the aftermath of which early-vesting, flexible plans became more desirable than previously anticipated. *See* Hirt v. Equitable Ret. Plan, 441 F. Supp. 2d 516, 520 (S.D.N.Y. 2006), *aff'd*, 533 F.3d 102 (2d Cir. 2008) (discussing development and advantages of cash balance plans).

The Court of Appeals for the Second Circuit summarized the advantages employers expect hybrid pensions to bestow upon employees: "(1)[T]hey are easier to understand; (2) they allow greater portability; (3) their benefits accrue more evenly over an employee's life-cycle; and (4) they are, therefore, better suited to the increased job-mobility of contemporary labor markets." *Esden*, 229 F.3d at 158 n.5 (discussing potential advantages of hybrid pensions). For employers, the court foresaw:

> (1)[B]ecause employees better appreciate the value of their pension rights, the employer's fringe benefit dollar has greater impact; and (2) the employer retains the funding advantages of a defined benefit plan, namely (a) actual contributions are made to a single trust fund, based on actuarial assumptions; therefore (b) the employer retains funding flexibility as long as the solvency of the plan is maintained; and (c) the investment experience in excess of the promised interest credits (as well as forfeitures of the non-vested benefits of any terminated participants) belongs to the employer. In short, advocates of this "hybrid" claim it offers employers—if not all employees—the best of both the defined benefit and the defined contribution pension formats.

Id. (discussing advantages of hybrid pension plans).

9. *See Cooper*, 457 F.3d at 641 (noting lack of guidance on meaning of "benefit accrual" in the statute as applied to hybrid plans); *cf. Esden*, 229 F.3d at 159 (noting that regardless of employers' objectives in using hybrid plans, regulatory framework geared toward traditional plans must be followed).

10. 477 F.3d at 68, 72 (finding ERISA's anti-age-discrimination and anti-backloading provisions applicable to hybrid pensions, but only to employer contributions, not employee receipts). *See Cooper*, 457 F.3d at 640-41 (noting that Seventh Circuit is first court of appeals to decide applicability of ERISA's anti-age-discrimination provision to hybrid pension plans). Although only two courts of appeals have heard such cases to date, many district courts, most notably those

This Casebrief identifies the Third Circuit's preferred analysis in cases concerning the applicability of ERISA to hybrid pensions, and serves as a guide to practitioners bringing or defending against these cases before the court.[11] Part II explains hybrid pension plans, the difficulty of applying certain provisions of ERISA to these plans and the federal judiciary's solutions to this problem.[12] Part III analyzes *Register*, setting forth the Third Circuit's methodology and reasoning in finding that ERISA's anti-age discrimination and anti-backloading provisions apply to hybrid pensions, but only to formulas for employer contributions, and not to employee receipts.[13] Part IV explains the Pension Protection Act of 2006, Congress's recent attempt to solve the same problems faced by the Third Circuit in *Register*.[14] As Part IV demonstrates, Congress reached many of the same conclusions as the *Register* court, but also left several questions unanswered, demonstrating the continued importance of *Register* given the growing popularity of cash balance pension plans.[15] Part V concludes by offering suggestions for practitioners before the Third Circuit. Specifi-

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under the jurisdiction of the Second Circuit Court of Appeals, have heard them in recent years. *Compare* Drutis v. Quebecor World (USA), Inc., 459 F. Supp. 2d 580, 591 (E.D. Ky. 2006) (finding hybrid plans permissible under ERISA's anti-age-discrimination provisions), *aff'd sub nom.* Drutis v. Rand McNally & Co., 499 F.3d 608 (6th Cir. 2007), *Hirt*, 441 F. Supp. 2d at 550 (same), Laurent v. PriceWaterhouseCoopers LLP, 448 F. Supp. 2d 537, 553 (S.D.N.Y. 2006) (same), *and* Tootle v. ARINC, Inc., 222 F.R.D. 88, 93-94 (D. Md. 2004) (same), *with* Richards v. FleetBoston Fin. Corp., 427 F. Supp. 2d 150, 167 (D. Conn. 2006) (finding ERISA's anti-age-discrimination provisions to prohibit hybrid pension plans), *In re* J.P. Morgan Chase Cash Balance Litig., 460 F. Supp. 2d 479, 488 (S.D.N.Y. 2006) (same), *In re* Citigroup Pension Plan ERISA Litig., 470 F. Supp. 2d 323, 336 (S.D.N.Y. 2006) (same), *overruled by* Vaughn v. Air Line Pilots Ass'n, Int'l, No. 03-CV-4822, 2008 U.S. Dist. LEXIS 56741, at *47-48 (E.D.N.Y. July 24, 2008), *and* Parson v. AT&T Pension Benefit Plan, No. 3:06CV552, 2006 U.S. Dist. LEXIS 93135 (D. Conn. Dec. 22, 2006) (same). In 2008, a district court within the Second Circuit affirmatively overruled a previous case concerning hybrid pensions and endorsed the view espoused by the Seventh Circuit in *Cooper*. *See Vaughn*, 2008 U.S. Dist. LEXIS 56741, at *47-48 (adopting *Cooper*'s reasoning and holding).

11. For a discussion of the Third Circuit's analysis of ERISA restrictions as applied to a hybrid pension plan, see *infra* notes 64-112 and accompanying text. For suggestions to practitioners bringing or defending similar cases before the court, see *infra* notes 126-31 and accompanying text.

12. For a discussion of the development of hybrid pension plans, the difficulty posed by applying ERISA's anti-age-discrimination and anti-backloading provisions to these plans and solutions proposed by commentators and several federal courts, see *infra* notes 17-63 and accompanying text.

13. For a discussion of the Third Circuit's *Register* analysis, which applied ERISA to a hybrid plan but in such a way that permitted the plans to remain in effect, see *infra* notes 64-112 and accompanying text.

14. For a discussion of the potential impact of the Pension Protection Act of 2006, which sought to remedy the tension between hybrid pension plans and ERISA, see *infra* notes 113-25 and accompanying text.

15. For a discussion of the potential impact of the Pension Protection Act of 2006 on future ERISA-related controversies, see *infra* notes 112-30.

cally, Part V identifies the potential problems in future ERISA cases and discusses arguments that will be most persuasive to the court.[16]

II. BACKGROUND

A. *ERISA, Hybrid Pensions and the Problem*

Congress enacted ERISA in 1974, in order to oversee and protect the methods by which employers ensured pensions for their employees.[17] Prior to 2006, ERISA contained provisions that restricted, among other things, age discrimination through allocation of pension benefits, as well as the "backloading" of benefits to discriminate against short-term workers.[18] Since its enactment, ERISA has applied these proscriptions to two recognized forms of private pension plans: defined contribution plans and defined benefit plans.[19]

16. For suggestions to practitioners before the Third Circuit concerning ERISA and hybrid pensions, see *infra* notes 126-31 and accompanying text.

17. *See* Levine & Imholtz, *supra* note 2, at 1-3 to 1-8 (discussing issues and concerns that culminated in passage of ERISA). As commentators have noted, federal interest in private pensions began not long after pensions became popular during the Industrial Revolution. *See id.* at 1-4 (discussing early development of private pension plans and federal tax policy aimed at stimulation of such plans). Apart from efforts on the part of the Judiciary and Congress to make private pension plans both transparent and a part of collective bargaining agreements, however, there was little support for direct federal regulation of pension plans until the 1960s. *See id.* at 1-4 to 1-6 (discussing early judicial opinions and federal laws that regulated private pensions as part of collective bargaining and sought to prevent abuse through transparency). After a presidential commission and the public revelation as to rampant abuse and instability, Congress passed ERISA nearly unanimously in 1974, despite criticisms from both labor and business interests. *See id.* at 1-7 (discussing opposition to ERISA from such disparate actors as activist Ralph Nader and conservative Nixon Administration).

Among ERISA's initial protections were rules regarding minimum funding, plan transparency and federal insurance in the event of bankruptcy. *See id.* at 1-8 (discussing protections provided in ERISA at enactment). In later years, Congress amended ERISA multiple times to meet the changing demands of the industry, but never moved away from a statutory classification for only two forms of pensions. *See* Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 638 (7th Cir. 2006) (discussing ERISA amendments' solidification of binary structure of pension regulation); Levine & Imholtz, *supra* note 2, at 1-9 to 1-20 (discussing amendments to ERISA aimed to help workers with multiple employers, increase security in workers' health benefits and otherwise meet demands of evolving pension industry).

18. *See* 29 U.S.C. § 1054(b)(1)(B) (2006) (prohibiting amendments to defined benefit plans that cause disproportionate increases in benefits of workers with long terms of service over those of shorter-term workers); § 1054(b)(1)(H)(i) (prohibiting age discrimination by employers that would cause employee receipts to cease or decrease on account of employees' ages); § 1054(b)(2)(A) (prohibiting employers using defined contribution plan from ceasing or decreasing contributions to individual accounts because of employees' ages).

19. *See* Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 61-62 (3d Cir. 2007) (noting that under ERISA, there are only two types of pensions); Kozak & Waldbeser, *supra* note 6, at 867 (explaining that under ERISA, there are only two permissible forms of private pension plans).

Under defined contribution plans, employers promise to place specific amounts of assets into individual employee accounts.[20] The balance of these accounts belongs to employees at their retirements.[21] ERISA considers every private pension plan that does not meet this definition to be a "defined benefit plan."[22]

Under a typical defined benefit plan, an employer promises to pay an annuity to employees after their retirements; the funds for the annuity come out of a general pool of the employer's assets.[23] The amount of each employee's annuity is calculated using a formula that may take into account the employee's term of service, age and other factors.[24] By the mid-1990s, however, a new form of pension plan had become prevalent.[25]

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20. *See* 29 U.S.C. § 1002(34) (2006) (defining defined contribution plans as "pension plan[s] which provide[ ] for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account").

21. *See id.* (defining defined contribution plans). In *Hughes Aircraft Co. v. Jacobson*, the Supreme Court characterized defined contribution plans as plans in which employers contribute fixed amounts, all of which belong to individual employees. *See* 525 U.S. 432, 439 (1999) (providing definition of defined contribution plans). The Court in *Hughes Aircraft* noted that in a defined contribution plan, employees bear the risk, but "there can never be an insufficiency of funds in the plan to cover promised benefits . . . since each beneficiary is entitled to whatever assets are dedicated to his individual account." *Id.* (quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 364 n.5 (1980)) (describing risks and benefits of defined contribution plans); *see also Register*, 477 F.3d at 61 (explaining nature of defined contribution plans).

22. *See* 29 U.S.C. § 1002(35) (2006) (defining defined benefit plans as "pension plan[s] other than [defined contribution plans]").

23. *See Hughes Aircraft*, 525 U.S. at 439 (discussing funding and ownership attributes of most defined benefit plans). The Supreme Court described a typical defined benefit plan as one that "consists of a general pool of assets rather than individual dedicated accounts," and one in which "the employee, upon retirement, is entitled to a fixed periodic payment." *Id.* (quoting Comm'r v. Keystone Consol. Indus., Inc., 508 U.S. 152, 154 (1993)) (describing attributes of defined benefit plan). In a defined benefit plan, the employer bears the risk. *See id.* at 439-40 (explaining allocation of risk in defined benefit plan).

24. *See* 29 U.S.C. § 1054(b)(1)(H)(ii) (2006) (permitting such factors to contribute to formulation for employer contributions to employees' pension benefits). There is a limit, however, to the extent that factors such as age and term of service may contribute to determination of employees' benefits. *See* § 1054(b)(2)(H)(i) (prohibiting age discrimination in accrual of employee benefits); § 1054(b)(1)(B) (prohibiting jumps in benefits over time that discriminate against short-term workers). Specifically, ERISA prohibits the "benefit accrual" under a defined benefit plan from favoring younger workers. *See* § 1054(b)(1)(H)(i) (describing anti-age discrimination requirements of defined benefit plan).

Traditionally, these provisions have been assumed to hold that the benefits received by younger and older workers cannot be determined solely by age or length of service. *See Register*, 477 F.3d at 63-64 (discussing definition of term "benefit accrual" in statute as applied to traditional defined benefit plan).

25. *See generally* Eaton v. Onan Corp., 117 F. Supp. 2d 812, 818 (S.D. Ind. 2000) (discussing birth and growth of hybrid pension plans); Kozak & Waldbeser,

These new types of plans, known as "cash balance" or "hybrid" plans, contain elements of both defined benefit and defined contribution plans.[26] Employers believed that such hybrid plans would attract younger employees in a dynamic labor market by increasing both an employee's choice in form and autonomy over their respective benefits.[27] Like employers that use defined contribution plans, employers using cash balance plans maintain individual accounts for each employee.[28] In the case of cash balance plans, however, these accounts are not actual assets, but instead are merely hypothetical reflections of accrued employer obligations.[29]

Benefits in hybrid accounts accrue in two forms: "pay" or "earnings" credits and interest credits.[30] Earnings credits, like employer contribu-

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supra note 6, at 868 (noting that hybrid plans developed and became popular in 1980s and 1990s).

26. *See Register*, 477 F.3d at 62 (noting that although cash balance plan is by law defined benefit plan, it in fact has "attributes of both" defined benefit and defined contribution plans); *Cooper*, 457 F.3d at 637 (classifying cash balance plan as defined benefit plan, but noting that "[i]t is almost, but not quite, a defined-contribution [sic] plan"). At least two of the federal circuit courts of appeals have noted the dichotomy. *See, e.g.*, *Register*, 477 F.3d at 62 (discussing hybrid nature of cash balance pension plans); Esden v. Bank of Boston, 229 F.3d 154, 158, 159 n.6 (2d Cir. 2000) (noting that cash balance plans are designed to imitate certain attributes of defined contribution plans, but are classified as defined benefit plans by law).

27. *See Eaton*, 117 F. Supp. 2d at 818 (describing cash balance plans as response to workers' demands for flexibility and autonomy over their benefits).

28. *See Esden*, 229 F.3d at 158 (explaining attributes of typical cash balance pension plan that coincide with those of defined contribution plan).

29. *See Register*, 477 F.3d at 62 (stating that although "cash balance plans are like defined contribution plans in that both define the employee's benefit in terms of a stated balance," that balance is in fact hypothetical); *Esden*, 229 F.3d at 158 (discussing typical cash balance plan). As the *Esden* court pointed out, the individual accounts used in a cash balance plan are merely hypothetical and reflect amounts owed to employees, not assets yet dedicated to employees' benefits. *See Esden*, 229 F.3d at 158 (discussing structure of cash balance plan). By tracking the amount that will eventually be owed to employees over time, employers using cash balance accounts are able to inform employees of what they may expect to receive in the future, and therefore "mimic the simplicity of a defined contribution plan." *See id.* (discussing purpose of hypothetical accounts in typical cash balance pension plan); *see also* Frequently Asked Questions About Cash Balance Pension Plans, http://www.dol.gov/ebsa/faqs/faq_consumer_cashbalanceplans.html (last visited Sept. 27, 2008) (describing basic attributes of all cash balance pension plans).

30. *See Esden*, 229 F.3d at 158 (explaining two forms of contributions in cash balance plan). In a typical cash balance plan, the first set of credits, "earnings credits," come from the employer through formulas similar to those used in defined benefit plans. *Compare id.* (describing earnings credits in typical cash balance plan), *with id.* at 158 n.4 (describing formula for employer contribution in typical defined benefit plan).

"Interest credits" supply contributions through compounding of account balances by an internal or external interest rate. *See id.* at 158 (explaining interest credits in typical cash balance pension plan). When employees enrolled in cash balance accounts retire, their accrued benefit is calculated by converting their hypothetical account balance of interest and earnings credits into annuities for life,

tions in a defined benefit plan, reflect obligations on the part of an employer to contribute to employees' ultimate benefit.[31] Interest credits, on the other hand, reflect accrued interest on account balances that will also eventually belong to employees over the course of their drawing payments from the employer's assets.[32]

Despite their hybrid nature, however, cash balance pension plans are considered defined benefit plans under ERISA.[33] This classification creates incongruous results when certain ERISA prohibitions are strictly applied to a cash balance plan.[34] For example, if a plan requires that employees as individuals accrue interest credits over time, younger employees in that plan will receive more than their older peers, in possible violation of ERISA anti-age-discrimination rules.[35] Moreover, because an employer's decision to switch to a cash balance plan will frequently cause a temporary freeze in hypothetical benefits, there will typically be a large jump in benefits for some employees at some later point in time, possibly causing backloading of benefits to a prohibited degree.[36] As many federal

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beginning at normal retirement age. *See* Brian M. Pinheiro & Jennifer DeMarco, *Qualified Retirement Plans*, *in* ERISA: A COMPREHENSIVE GUIDE 3-13 (Paul J. Schneider & Brian M. Pinheiro eds., 2008) (discussing interest credits and relationship to actual employees' benefits). Often, employees enrolled in a cash balance plan will also have the option of receiving their benefit as a lump-sum payment, which should be equal to the balance of their hypothetical account. *See id.* (discussing effect of conversion from annuity to lump-sum payment in cash balance account).

31. *See id.* (describing earnings credits and interest credits in cash balance pension plan); *see also* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999) (explaining employer contributions in typical defined benefits plan).

32. *See* Pinheiro & DeMarco, *supra* note 30, at 3-13 (explaining interest credits in typical cash balance plan and how such credits affect ultimate employee benefits).

33. *See* 29 U.S.C. § 1002 (35) (2006) (defining defined benefit plan as "a pension plan other than a [defined contribution plan]"); *Esden*, 229 F.3d at 158 ("[N]otwithstanding that cash balance plans are designed to imitate some features of defined contribution plans, they are nonetheless defined benefit plans under ERISA.").

34. *See* Pinheiro & DeMarco, *supra* note 30, at 3-13 to 3-14 (noting that application of ERISA's anti-age-discrimination and anti-backloading provisions to cash balance accounts is controversial and often litigated).

35. *See id.* (explaining basis of age discrimination claim against cash balance accounts). Two commentators provided the following illustration of the problem:

> For a 30-year-old employee, the value of a[n earnings] credit and the 35 years of interest credits associated with that [earnings] credit at normal retirement age is greater than the value of a[n earnings] credit and 10 years of associated credits for a 55-year-old. When viewed as a defined contribution plan on the other hand, the [earnings] credit and interest credit added to a participant's hypothetical account each year is the same for every employee, regardless of age.

Id. (providing hypothetical to explain basis of age discrimination claim against cash balance pension plan); *see also* Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 640 (7th Cir. 2006) (providing detailed hypothetical to explain effect of interest credits in age discrimination claim against cash balance pension plan).

36. *See Esden*, 229 F.3d at 167 n.18 (explaining anti-backloading provisions of ERISA). The ERISA anti-backloading provisions set maximum rates for the in-

courts faced with such issues have acknowledged, these consequences are inherent in an employer's adoption of a cash balance plan.[37] Therefore, applying these provisions of ERISA strictly to cash balance pension plans could effectively render such plans impermissible.[38]

B. *Development of the Case Law: A Split Among the Federal Judiciary*

In recent years, many lower federal courts have noted the contradiction inherent in applying the "rigidly binary" nature of federal pension regulation to cash balance pension plans.[39] Courts have predominately chosen one of two modes of analysis to resolve this apparent conflict.[40]

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crease of benefits in an account over time. *See* 29 U.S.C. § 1054(b)(1)(B) (2006) (prohibiting increases in benefits over time at rate greater than prescribed maximum). In effect, these standards prohibit employers from allowing employees' benefits to accrue only after the employees have remained with a single employer for a long period of time. *See Esden*, 229 F.3d at 167 n.18 (explaining effect of ERISA's anti-backloading provisions); *see also Register*, 477 F.3d at 71 (citing Hoover v. Cumberland, Md. Area Teamsters Pension Fund, 756 F.2d 977, 982 n.10 (3d Cir. 1985)) (determining that purpose of ERISA's anti-backloading provisions is to prohibit discrimination against short-term workers).

37. *See, e.g.*, Laurent v. PriceWaterhouseCoopers LLP, 448 F. Supp. 2d 537, 552 (S.D.N.Y. 2006) (noting that under reasoning advocated by plaintiffs in ERISA age discrimination case, "all cash balance plans violate the ERISA age discrimination provision"); *cf. Esden*, 229 F.3d at 158 (discussing other problems inherent in applying certain ERISA provisions to cash balance pension plans).

38. *See Register*, 477 F.3d at 64 n.5 (refraining from listing specific "horribles" that may flow from decision concerning ERISA and cash balance pensions, but conceding that "much is at stake"). Because the accrual of interest credits is an inherent part of cash balance plans, prohibiting their increase over time would defeat the purpose of a hybrid plan. *See Esden*, 229 F.3d at 158 n.5 (discussing perceived advantages of cash balance plan, most of which depend upon accrual of interest credits over time); Kozak & Waldbeser, *supra* note 6, at 876 (stating that, should ERISA provisions intended to regulate traditional defined benefit plans be applied to cash balance plans, cash balance plans are "doomed to fail").

39. *See, e.g.*, *Esden*, 229 F.3d at 159 n.6 (describing nature of federal pension regulation). Following the Second Circuit's *Esden* decision, the tension between ERISA and hybrid pension plans was noted throughout the Second Circuit's district courts. *See, e.g.*, *In re* Citigroup Pension Plan ERISA Litig., 470 F. Supp. 2d 323, 332 (S.D.N.Y. 2006) (noting dramatic consequences of classification of cash balance plans as defined benefit plans under ERISA); *In re* J.P. Morgan Chase Cash Balance Litig., 460 F. Supp. 2d 479, 481 (S.D.N.Y. 2006) (same); Richards v. FleetBoston Fin. Corp., 427 F. Supp. 2d 150, 163 (D. Conn. 2006) (same). The same consequences have been noted elsewhere throughout the federal judiciary, but with less frequency. *See, e.g.*, Eaton v. Onan Corp., 117 F. Supp. 2d 812, 817-18 (S.D. Ind. 2000) (noting that rules regarding defined benefit plans pre-date development of cash balance plans).

40. *See Register*, 477 F.3d at 66 (noting split between federal district courts on issue of how to apply certain provisions of ERISA to cash balance pension plans). *Compare In re Citigroup*, 470 F. Supp. 2d at 341 (construing ERISA strictly and finding violation by cash balance plan), *In re J.P. Morgan*, 460 F. Supp. 2d at 485-87 (same), *and Richards*, 427 F. Supp. 2d at 158-59 (same), *with Cooper*, 457 F.3d at 639 (using practical function of statute and underlying congressional intent to determine that cash balance plans do not violate ERISA), *Laurent*, 448 F. Supp. 2d at 553 (same), *and* Drutis v. Quebecor World (USA), Inc., 459 F. Supp. 2d 580, 588

Some have employed strict construction of ERISA and related regulations in order to preserve the equity and stability first sought by the statute's 1974 framers.[41] Others have instead looked primarily to the balance between stability for workers and flexibility for employers implicit in the statute, as well as the practical impact of possible decisions.[42]

Not surprisingly, this interpretive divide has caused courts to reach diametrically opposing conclusions when deciding how to apply ERISA's anti-age-discrimination and anti-backloading provisions to cash balance pension plans.[43] In recent ERISA cases—including *Register*—the Third Circuit has employed a broad method of analysis.[44] In those recent cases,

(E.D. Ky. 2006) (same), *aff'd sub nom.* Drutis v. Rand McNally & Co., 499 F.3d 608 (6th Cir. 2007).

41. *See, e.g., Esden*, 229 F.3d at 159 (disregarding hybrid nature of cash balance pension plans in order to apply ERISA as if cash balance plans were traditional defined benefit plans); *In re J.P. Morgan*, 460 F. Supp. 2d at 486-87 (using dictionary to interpret congressional intent embodied in ERISA and enforcing ERISA provisions against cash balance pension plan); *see also* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2(C), 88 Stat. 832 (codified as amended at 29 U.S.C. § 1001(a) (2006)) (finding need to improve "equitable character" of private pension plans through vesting rules, minimum funding standards and requirements for insurance).

42. *See, e.g., Cooper*, 457 F.3d at 639 (looking to practical function and impact of disputed ERISA provisions in order to determine their effect on cash balance pensions); *Drutis*, 459 F. Supp. 2d at 588 (citing *Cooper*, 457 F.3d at 638-39) (considering hybrid nature of cash balance pension plans in order to strike balance between needs of workers and employers, as well as underlying goals of ERISA); *Laurent*, 448 F. Supp. 2d at 553 (noting that despite their legal classification, cash balance plans are different than traditional defined benefit plans and, therefore, applying ERISA provisions strictly to such plans would not be "logical").

43. *Compare In re Citigroup*, 470 F. Supp. 2d at 341 (construing ERISA strictly and finding violation by cash balance plan), *In re J.P. Morgan*, 460 F. Supp. 2d at 485-87 (same), *and Richards*, 427 F. Supp. 2d at 158-59 (same), *with Cooper*, 457 F.3d at 639 (using practical function of statute and underlying congressional intent to determine that cash balance plan did not violate ERISA), *Drutis*, 459 F. Supp. 2d at 588 (same), *and Laurent*, 448 F. Supp. 2d at 553 (same).

44. *See, e.g.*, Smith v. Hartford Ins. Group, 6 F.3d 131, 136 (3d Cir. 1993) (adopting Eleventh Circuit's test for determining presence of plan by considering whether reasonable observer could identify attributes of plan based on surrounding circumstances); *see also* Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (announcing test for presence of plan under ERISA); Joshua Bachrach et al., *Third Circuit, in* ERISA SURVEY OF FEDERAL CIRCUITS 61 (Brooks R. Magratten ed., 2007) (discussing Third Circuit's adoption of Eleventh Circuit's rule). The Third Circuit's analysis in *Smith* looked to the balance achieved by Congress in the overall statutory scheme and considered the practical observations of a reasonable observer. *See Smith*, 6 F.3d at 136-37 (discussing context and balance of statutory scheme).

In other cases, the court has shown concern for the practical impact its decisions may have on the private sector. *See* Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 392 (3d Cir. 2000) (discussing practical impact of ruling). Even when compelled by Supreme Court precedent to reach a particular outcome, the court has taken pains to discuss the practically "unsatisfying" implications of its holding. *See id.* (discussing impact of ruling regarding standard of review over pension plans); Bachrach et al., *supra* note 44, at 70 (discussing holding and implications of *Pinto*).

the court felt compelled by both Supreme Court and Third Circuit precedent to analyze the overall congressional intent present within the statutory scheme and to determine the reasonable impact of solutions proposed before it.[45]

1. Esden *and the Early Trend Towards Strict Construction*

In *Esden v. Bank of Boston*,[46] the Second Circuit Court of Appeals became the first court to provide a general framework for applying certain ERISA provisions to cash balance pension plans.[47] Specifically, the *Esden* court decided that ERISA rules regarding conversion of employees' benefits to lump-sum payments applied to a cash balance plan in the same manner as to a defined benefit plan.[48] The court reasoned that it was bound, both by Treasury Department regulations and by the original intent of Congress in enacting ERISA, to apply the statute's exacting rules to the cash balance plan.[49]

45. *See Register*, 477 F.3d at 66 (discussing Supreme Court and Third Circuit cases influencing court's decision). The Supreme Court has issued decisions that guide lower court analysis of ERISA and other complex statutory schemes. *See id.* (applying Supreme Court precedent to determine proper application of ERISA to cash balance pension plan). In such cases, the Court has determined that courts should interpret congressional intent by examining the overall statutory scheme and practical implications of proposed solutions. *See* King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (requiring interpreting courts to consider statutory context); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) (requiring that statutory interpretation lead to reasonable results given reality of context); Alaka v. Attorney General, 456 F.3d 88, 104 (3d Cir. 2006) (concluding that court should determine congressional intent by analyzing overall statutory scheme); Rosenberg v. XM Ventures, 274 F.3d 137, 141-42 (3d Cir. 2001) (determining that role of court is to interpret congressional intent); Evcco Leasing Corp. v. Ace Trucking Co., 828 F.2d 188, 195 (3d Cir. 1987) (requiring interpretation of statute not lead to unjust or unreasonable results). Specifically in the context of pensions, the Court has consistently looked to practical concerns and a need to preserve some degree of employer flexibility in establishing and maintaining a private pension plan. *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999) (discussing nature of two traditional forms of pension plan and legal implications of each); Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) (allowing time value of money to cause increased receipts of pension benefits for younger workers without violating anti-age-discrimination rules).

46. 229 F.3d at 157.

47. *See id.* (noting controversy surrounding ERISA and cash balance pensions as "relatively new," and recognizing issue in case before it as one of first impression in courts of appeals).

48. *See id.* (stating issue of case and announcing decision against employer).

49. *See id.* at 158, 162, 164 (citing authority that court had interpreted as requiring strict reading of ERISA when applied to cash balance pension plans). *Esden* presented one issue that was not material to the Third Circuit's *Register* analysis: the degree of deference afforded to a federal agency's binding decision on a matter of ERISA interpretation. *See id.* at 164-74 (discussing authority of Treasury Department notices and regulations on issue before court). In short, the *Esden* court determined that multiple Treasury Department decisions spoke directly to the question before it, and recognized that the court was thus required to accord deference to those decisions unless the decisions proved to be unreasonable

Some federal courts, particularly those within the Second Circuit, have interpreted *Esden* as a blanket endorsement of strict ERISA construction, including the interpretation of the term "benefit accrual" in the statute's anti-age-discrimination provision.[50] These courts, finding "benefit accrual" to mean the amounts employees receive (just as it would when applied to a traditional defined benefit plan), have concluded that ERISA forbids the accrual of interest credits over time.[51] According to these courts, this method of analysis enforces explicit mandates embodied in ERISA.[52] It also allows the courts to defer to congressional wisdom and await further guidance without enforcing their own economic views.[53] At the same time, however, this method of analysis threatens to render all cash balance pension plans illegal under ERISA.[54]

2. *Broader, Practical Analysis Culminating in* Cooper

Other lower courts have sought to reconcile ERISA's binary structure with the development of cash balance pension plans by looking to the practical impact of their decisions and Congress's broader intent expressed in the statute.[55] Citing Congress's overall determination that there may be no allocation of resources unduly based on age or term of

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or clearly erroneous. *See id.* (discussing impact of Treasury decisions on question before court); *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984) (announcing two-part test for determining deference that federal courts must show to agency determinations of law).

50. *See In re* J.P. Morgan Chase Cash Balance Litig., 460 F. Supp. 2d 479, 486-87 (S.D.N.Y. 2006) (applying *Esden* reasoning to determine that cash balance plan "is not age neutral"); Richards v. FleetBoston Fin. Corp., 427 F. Supp. 2d 150, 164 (D. Conn. 2006) (applying *Esden* to determine that cash balance plan must conform to ERISA in same manner as defined benefit plan).

51. *See In re J.P. Morgan*, 460 F. Supp. 2d at 487-88 (finding that because younger workers enrolled in cash balance plan will necessarily accrue more interest credits over time than will older workers enrolled in cash balance plan, "benefit accrued" of such workers is impermissibly discriminatory); *Richards*, 427 F. Supp. 2d at 164 (determining that ERISA rules apply to cash balance plan just as they apply to defined benefit plan).

52. *See Esden*, 229 F.3d at 172-73 (discussing Congress's purpose for enacting ERISA).

53. *Compare id.* (deferring to economic analysis of Congress and Internal Revenue Service), *with* Cooper v. IBM Pers. Pension Plans, 457 F.3d 637, 642-43 (7th Cir. 2006) (applying court's economic analysis to determine that cash balance plan is permissible under ERISA).

54. *See* Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 64 (3d Cir. 2007) (discussing possible consequences if ERISA were found to bar employers' use of interest credits and other attributes of cash balance plans).

55. *See, e.g.*, Drutis v. Quebecor World (USA), Inc., 459 F. Supp. 2d 580, 588 (E.D. Ky. 2006) (finding broad intent of Congress to support decision for cash balance plan under ERISA), *aff'd sub nom.* Drutis v. Rand McNally & Co., 499 F.3d 608 (6th Cir. 2007); Eaton v. Onan Corp., 117 F. Supp. 2d 812, 825 (S.D. Ind. 2000) (looking to such factors as "legislative history, the broader purposes of the legislation at issue . . . as well as common sense and the practical implications of the alternative interpretations" to determine that cash balance plan is permissible under ERISA).

service, these lower courts have defined "benefit accrual" in ERISA as employer contributions, rather than employee receipts.[56] In so doing, these courts permit interest credits in employees' individual accounts to increase over time, causing increased benefits for some workers.[57]

In *Cooper v. IBM Personal Pension Plans*,[58] the Seventh Circuit became the first federal court of appeals to accept this rationale and find cash balance pensions permissible under ERISA.[59] In *Cooper*, the court determined that because the disparity in the rate of increase in younger and older workers' accounts occurred not as a result of additional contributions by employers, but because of interest compounded over time, the plans did not violate federal law.[60] Acknowledging that hybrid plans are considered defined benefit plans by law, the *Cooper* court determined that the term "benefit accrual" must have a different meaning when applied to cash balance plans.[61] Accordingly, the court found that the overall

56. *See Drutis*, 459 F. Supp. 2d at 588 ("[T]he Congressional [sic] intent to avoid age discrimination under both types of plans can only be carried out if 'benefit accrual' means the same things as 'allocations' to the employee's account."); Hirt v. Equitable Ret. Plan, 441 F. Supp. 2d 516, 545 (S.D.N.Y. 2006) (noting that relevant provisions of ERISA were added not to change employer methods of distributing contributions, but to prohibit discrimination against workers who continue working beyond normal retirement age), *aff'd*, 533 F.3d 102 (2d Cir. 2008); *Eaton*, 117 F. Supp. 2d at 830-31 (determining that Congress's intent in enacting ERISA and subsequent amendments thereto was to prevent employers from stopping or decreasing contributions to employees' benefits on account of age).

57. *See Drutis*, 459 F. Supp. 2d at 588 (finding that precedent and legislative history suggest cash balance plan is permissible under ERISA); *Hirt*, 441 F. Supp. 2d at 518 (finding that cash balance plan is permissible under ERISA); *Eaton*, 117 F. Supp. 2d at 826 (stating that finding against cash balance plan under ERISA would require "strange" reading of statute).

58. 457 F.3d 637 (7th Cir. 2006).

59. *See id.* at 639 (determining that cash balance accounts are permissible under ERISA because, in eyes of court, Congress did not seek to prohibit benefit through increasing time-value of money); *see also Drutis*, 459 F. Supp. 2d at 587 (crediting Seventh Circuit as first appellate court to decide case applying ERISA age discrimination provision to cash balance pension plan); Laurent v. PriceWaterhouseCoopers LLP, 448 F. Supp. 2d 537, 554 (S.D.N.Y. 2006) (same).

60. *See Cooper*, 457 F.3d at 639 (stating that "most natural reading" of "benefit accrual" suggests that term refers to employer contributions).

61. *See id.* (using regulations regarding defined contribution plans to guide analysis of regulation applied to cash balance plan). The court noted that the term "allocation" in the anti-age-discrimination section applicable to defined contribution plans refers to employer input. *See id.* (discussing meaning of "allocation" in ERISA's anti-age-discrimination provision applicable to defined contribution plans); *see also* 29 U.S.C. § 1054(b)(2)(A) (2006) ("A defined contribution plan satisfies . . . [ERISA] if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of age . . . ."). The Seventh Circuit reasoned that "there is no statutory difference between the treatment of economically equivalent defined-benefit [sic] and defined-contribution [sic] plans." *Cooper*, 457 F.3d at 639. Therefore, ERISA prohibits all employers from engaging in one form of conduct—discrimination through their allocations to employees' benefits. *See id.* (discussing Congress's underlying rationale in enacting ERISA).

scheme enacted by Congress through ERISA was intended to stop willful discrimination by employers, which the court did not see as a risk in allowing interest to grow over time.[62] Finally, the court recognized the practical impact of its decision on both the increasing number of companies switching to hybrid plans, and the need to apply certain defined contribution definitions in order for these plans to remain permissible under law.[63]

III. ANALYSIS

A. *Summary of the Third Circuit's* Register *Analysis*

In *Register*, the Third Circuit followed the majority of courts that have ruled on the issue, and found PNC's hybrid pensions permissible under the anti-age-discrimination and anti-backloading provisions of ERISA.[64] Specifically, the *Register* court considered the permissibility of an employer's switch from a traditional defined pension plan to a cash balance plan.[65] In making its decision, the court relied heavily on Congress's intent in enacting ERISA and the potential practical impact of the court's

62. *See id.* at 639, 642 (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993)) (discussing fault in finding time-value of money discriminatory).

63. *See id.* at 642-43 (discussing practical impact of employer's choice of plan). The Seventh Circuit appears to have reached its decisions, in part, out of deference to employers' freedom to choose the best plan to suit their specific individual situations. *See id.* at 643 (acknowledging need for flexibility for employers in choosing models for employee pension plans). The court, therefore, applied ERISA in a way that enforces a baseline of equity—in that employer contributions to employees' plans are regulated—but also permits the flexibility and freedom required in pension planning. *See id.* ("[T]he decision [to use one form of pension plan] may . . . be made freely, governed by private choice rather than legal constraint.").

64. *See* Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 68 (3d Cir. 2007) (finding that cash balance plan was permissible under ERISA's anti-age-discrimination and anti-backloading provisions).

65. *See id.* at 60-61 (discussing facts and procedural history of case). PNC switched its plan in 1999 and began a program typical for a cash balance plan—employees were assigned hypothetical accounts in which earnings and interest credits accrued over time. *See id.* (discussing details of PNC's cash balance plan). For a discussion of the attributes of a typical cash balance pension plan, see *supra* notes 26-32 and accompanying text.

In 2004, former PNC employees, all of whom had been plan participants as employees, brought a five-part claim against PNC in the District Court for the Eastern District of Pennsylvania. *See Register*, 477 F.3d at 61 (discussing plaintiffs' claims against PNC); *see also* Register v. PNC Fin. Servs. Group, Inc., 36 Employee Benefits Cas. (BNA) 1321, 1323 (E.D. Pa. Nov. 21, 2005) (discussing plaintiffs' claims). In addition to claiming that PNC's cash balance plan violated the anti-age-discrimination and anti-backloading provisions of ERISA, the plaintiffs also claimed that the plan violated ERISA-imposed notice and fiduciary duty requirements. *See Register*, 477 F.3d at 61 (discussing plaintiffs' claims against PNC). These latter claims, like those discussed *supra*, were dismissed by the district court on summary judgment. *See id.* at 72-74 (discussing plaintiffs' notice and fiduciary claims).

own decision in the case.[66] The Third Circuit also interpreted the history of pension regulation and relevant Supreme Court precedent to require a certain degree of flexibility for employers in managing their employees' pension plans.[67]

After noting the facts of the case, the Third Circuit began its analysis by explaining the nature of cash balance plans as a hybrid of the two traditional forms of pension plans.[68] The court discussed the competing positions on the issue as argued for in other courts.[69] In considering the relevant Supreme Court precedent, the Third Circuit made a point to evaluate the particular context of that precedent in order to resolve the tension between cash balance plans and ERISA's "rigid" statutory scheme.[70] For the *Register* court, this context included ERISA provisions applicable to defined contribution plans, as well as those affecting defined benefit plans.[71] Moreover, the court agreed with the Seventh Circuit's

66. *See id.* at 69-70 (discussing congressional intent and practical impact of finding that ERISA's anti-age-discrimination and anti-backloading provisions do not prohibit cash balance pension plan).

67. *See* Kozak & Waldbeser, *supra* note 6, at 886 (discussing differences between *Cooper* and *Register*).

68. *See Register*, 477 F.3d at 61-63 (explaining nature of cash balance pension plans as related to two traditional forms of plans). The Third Circuit noted that a cash balance plan "by law, is a form of defined benefit plan and must comply with the statutory regulations applicable to defined benefit plans . . . . However, in actuality, a cash balance plan is a hybrid between a defined contribution plan and a defined benefit plan as it contains attributes of both." *Id.* at 62 (citing Esden v. Bank of Boston, 229 F.3d 154, 158-59 (2d Cir. 2000)) (noting attributes of cash balance plan, as compared to two traditional forms of pension plans). The *Esden* court, by contrast, noted the hybrid nature of cash balance pension plans, but more definitively discussed the classification of the plans as defined benefit plans. *See Esden*, 229 F.3d at 158 ("[N]otwithstanding that cash balance plans are designed to imitate some features of defined contribution plans, they are nonetheless defined benefit plans under ERISA.").

69. *See Register*, 477 F.3d at 66–67 (noting divergent decisions regarding applicability of ERISA to cash balance plans).

70. *See id.* at 67-68 (discussing anti-age-discrimination and anti-backloading defined benefit plan provisions of ERISA within context of ERISA generally). The court interpreted its own precedent as requiring it to discern congressional intent on the issue. *See id.* at 67 (citing Rosenberg v. XM Ventures, 274 F.3d 137, 141 (3d Cir. 2001)) (concluding that precedent compelled court to look to congressional intent in order to interpret ERISA); Alaka v. Attorney General, 456 F.3d 88, 104 (3d Cir. 2006) (same). The Third Circuit's cases required the court to determine whether an applicable provision of a statute was ambiguous in light of the entire statutory scheme. *See id.* (noting Supreme Court precedent on proper methods of statutory interpretation). Further, the court interpreted Supreme Court case law to require the reading of a statute "as a whole," and in a manner that avoids producing "untenable distinctions and unreasonable results." *See id.* (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991)) (discussing proper methods of statutory interpretation); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) (same); *see also Esden*, 229 F.3d at 159 n.6 (calling ERISA regulations "rigidly binary").

71. *See Register*, 477 F.3d at 68 (looking to "parallel" provisions of ERISA for guidance). First, the court noted that the very nature of cash balance plans as hybrids suggested a decision similar to that made by the Seventh Circuit in *Cooper*. *See id.* (discussing *Cooper* and approving of Seventh Circuit's analysis regarding ER-

conclusion in *Cooper* that Congress intended the relevant defined benefit and defined contribution-specific provisions to prevent discriminatory employer behavior.[72] Therefore, the Third Circuit read the parallel provisions together as a general bar to intentional and dramatic employer discrimination of employees based on age and terms of service.[73]

The court also examined Supreme Court precedent and its own ERISA-related case law and determined that that precedent required the court to consider a controversy's practical ramifications.[74] Here, the *Register* court found that although an argument against cash balance plans had

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ISA and cash balance pension plans); *see also* Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 638 (7th Cir. 2006) (finding applicable ERISA provisions regulating employer inputs). For a discussion of the Seventh Circuit's reasoning in *Cooper*, see *supra* notes 57-62 and accompanying text. Noting the nature of cash balance plans, the Third Circuit compared the parallel anti-age-discrimination provisions in ERISA for defined benefit plans and defined contribution plans, and determined that they were both intended by Congress to prevent the same behavior. *See Register*, 477 F.3d at 68 (determining purpose of parallel ERISA anti-age-discrimination provisions). Quoting the *Cooper* court, the Third Circuit determined that both provisions prohibited "'the employer [from ceasing] allocations (or accruals) to the plan or chang[ing] their rate on account of age.'" *Id.* (quoting *Cooper*, 457 F.3d at 638) (discussing underlying goals of ERISA still enforced in cash balance plan); *see also* 29 U.S.C. § 1054(b)(1)(H)(i) (2006) (prohibiting age discrimination by employers that would cause employees' "benefit accrual" to stop or decrease on account of age); § 1054(b)(2)(A) ("A defined contribution plan satisfies [ERISA] if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age."). After reciting the ERISA provision that applies to defined contribution plans, the Third Circuit held that, "[t]he PNC plan does not make [a prohibited] reduction." *See Register*, 477 F.3d at 68 (applying perceived requirements of ERISA to PNC's cash balance plan); *see also* § 1054(b)(2)(A) (describing anti-age-discrimination rule for defined contribution plans).

72. *See Register*, 477 F.3d at 68-70 (agreeing with *Cooper* court's conclusion that Congress intended ERISA's age discrimination provisions regarding defined benefit plans and defined contribution plans to prevent same behavior by employers); *id.* at 71-72 (finding that harm Congress sought to prevent through anti-backloading ERISA provisions was "not implicated by the PNC conversion" to cash balance plan); *see also Cooper*, 457 F.3d at 638 (finding that ERISA's anti-age-discrimination provisions for defined contribution and defined benefit plans "appear to say the same thing").

73. *See Register*, 477 F.3d at 68, 70 (discussing Congress's intent that parallel ERISA provisions prevent intentional employer discrimination on account of employees' ages).

74. *See id.* at 67-68 (finding case law to require consideration of possible "'injustice or oppression'" through interpretation of statute (quoting Evcco Leasing Corp. v. Ace Trucking Co., 828 F.2d 188, 195 (3d Cir. 1987))). The court noted that Supreme Court precedent required it to read the statute in a manner that avoided "'unreasonable results'" and tension between provisions of the statutory scheme. *See id.* (quoting Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982)) (discussing proper methods of statutory interpretation). Further, throughout the *Register* decision, the court cited other pension-related Supreme Court decisions that discussed the impact of their holdings given the realities of the pension industry. *See, e.g., id.* at 62 (citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999)) (discussing details of various pension plans); *id.* at 66 (citing Hazen Paper

merit based on the text of ERISA alone, such an argument ignored important practical implications.[75] Specifically, the court perceived a strict reading of ERISA to require the end of cash balance pension plans—a consequence that seemed to the court more restrictive than that which Congress originally intended.[76]

Like the Seventh Circuit, the court in *Register* found that ERISA acknowledges the importance of flexibility for employers in deciding on an appropriate pension plan for their employees.[77] Although it does impose certain important restrictions on employers' decisions, ERISA does not prohibit adaptation to new market forces.[78] The court concluded, therefore, that the term "benefit accrual" in ERISA applies only to employer input and not employee receipts.[79]

B. *Critical Analysis of* Register*'s Framework*

In *Register*, the Third Circuit established a detailed blueprint for resolving controversies related to cash balance plans and ERISA.[80] By carefully explaining the impact of relevant Supreme Court precedent on the controversy and its own interpretation of the history of the statute, the court ensured that *Register* will provide a strong foundation for future cases in the same mold.[81] This framework entails considering the broad congressional goals expressed in ERISA, predicting the practical impact of proposed solutions to controversies before it and preserving a degree of

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Co. v. Biggins, 507 U.S. 604, 611 (1993)) (determining that reality of money's increasing value over time does not constitute age discrimination).

75. *See Register*, 477 F.3d at 68-69 (noting that cash balance plans are classified as defined benefit plans under law, but that ruling in line with classification would lead to nonsensical ruling).

76. *See id.* at 64 (agreeing with district court that decision against pension plan would mean that design of all cash balance plans would violate ERISA); *id.* at 69 (analogizing effect of pension plan's interest credits to that of money saved in bank account).

77. *See id.* at 69 (discussing degree of flexibility ERISA affords employers in developing pension plans); *Cooper*, 457 F.3d at 642-43 (finding that in light of statute, decisions regarding use of interest credits are best "governed by private choice rather than legal constraint").

78. *See Register*, 477 F.3d at 69 (finding that employers may use "time value of money" to entice employees without discriminating against employees on account of age).

79. *See id.* at 67-68 (discussing ultimate issue as interpretation of "benefit accrual" and agreeing with *Cooper* court regarding meaning of term).

80. *See* Kozak & Waldbeser, *supra* note 6, at 886 (discussing interpretive framework used in *Register* as appropriate use of congressional intent and existing precedent).

81. *See id.* at 886-87 (praising Third Circuit for detailing its reasoning and providing sound foundation for interpretation); *Register*, 477 F.3d at 62, 66-68 (discussing impact of Supreme Court precedent on dispute concerning ERISA and cash balance pensions).

flexibility for employers in determining a suitable pension plan for their employees.[82]

1. *Consideration of ERISA's Broad Goals*

In *Register*, the Third Circuit interpreted ERISA's prohibitions on age discrimination and backloading in light of the broad congressional goals expressed in the statute.[83] To determine Congress's intended meaning of the term "benefit accrual," the court looked to such factors as the overall regulatory structure and the reasonableness of results associated with proposed interpretations.[84] An examination of these factors suggested to the court that Congress intended "benefit accrual" to mean employer input within the context of a cash balance pension plan.[85]

Taking account of the overall statutory context, the court noted the similarities between ERISA provisions that regulate defined benefit and defined contribution plans.[86] The court believed that these similarities demonstrated Congress's underlying intention for enacting ERISA: to enforce fundamental fairness and equity, without overly burdening employ-

82. *See Register*, 477 F.3d at 67-68 (looking to context of overall statutory scheme and possible practical impact in interpreting ERISA as applied to cash balance pension plans); *id.* at 69 (preserving flexibility for employers in interpreting ERISA).

83. *See id.* at 67 (interpreting Third Circuit and Supreme Court precedent to require court to look to congressional intent when interpreting ERISA).

84. *See id.* (looking to parallel provisions of ERISA tailored towards defined benefit plans and defined contribution plans and finding that both provisions seek to prohibit same employer behavior).

85. *See id.* at 67-68 (finding that underlying goals of ERISA did not prevent PNC from using cash balance pension plan). In reaching this decision, the court noted the opposite view taken by district courts in the Second Circuit. *See id.* (discussing analysis by certain Second Circuit district courts regarding term "benefit accrual"). The court stated that these district courts "believed that Congress, in choosing to prohibit discriminatory 'allocat[ions]' in the defined contribution plan provision but discriminatory 'benefit accrual[s]' in the defined benefit plan provision, must have intended to prohibit different conduct." *Id.* (characterizing reading by district courts of Second Circuit); *accord In re* Citigroup Pension Plan ERISA Litig., 470 F. Supp. 2d 323, 332 (S.D.N.Y. 2006) (finding term "benefit accrual" in ERISA to refer to employee receipts when applied to cash balance pension plan); *In re* J.P. Morgan Chase Cash Balance Litig., 460 F. Supp. 2d 479, 481 (S.D.N.Y. 2006) (same); Richards v. FleetBoston Fin. Corp., 427 F. Supp. 2d 150, 163 (D. Conn. 2006) (same). For a discussion of the analysis employed by these and other courts that reached an opposite result to that of the Third Circuit when construing the same provision of ERISA, see *supra* notes 44-49 and accompanying text.

86. *See Register*, 477 F.3d at 68 (discussing similarities in parallel ERISA provisions). The court's recognition of this fact coincided with proposed Treasury Department regulations that had been withdrawn during congressional consideration of the Pension Protection Act of 2006. *See* STEPHEN J. KRASS, THE 2008 PENSION ANSWER BOOK 9-33 to 9-34 (2008) (discussing proposed regulations that attempted to prohibit age discrimination in cash balance pension plans by imposing limits similar to those affecting both defined benefit plans and defined contribution plans). For a discussion of the rules that Congress ultimately enacted to replace the proposed regulations, see *infra* notes 107-18 and accompanying text.

ers' flexibility.[87] Specific to age discrimination and backloading, the *Register* court viewed this intention as prohibiting only deliberate discrimination through employer allocations based on age or term of service.[88] The court, pursuant to this interpretation of congressional intent, determined that "benefit accrual" in the statute refers to employer contributions to the account balances as defined by the plan.[89]

2. *Projecting the Practical Impact of Proposed Solutions*

In determining ERISA's meaning, the Third Circuit also attempted to analyze the practical impact of the solutions proposed by the parties in *Register*.[90] The court considered the realities of the market as well as the effect its decision might have in the future.[91] Like the Seventh Circuit before it, the court in *Register* attempted to ensure that, in the current technical regulatory environment, its interpretation of ERISA did not exist in a vacuum.[92]

The court believed that it was required by precedent to reach a "reasonable" decision given the reality of the pension marketplace.[93] At multi-

87. *See* KRASS, *supra* note 86, at 68-69 (citing congressional intent to prevent unfairness to workers, but not through technical reading of statute); Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 642-43 (7th Cir. 2006) (discussing congressional intent to preserve degree of autonomy for employers despite regulatory scheme); *see also* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2, 88 Stat. 832 (codified as amended at 29 U.S.C. § 1001 (2006)) (discussing Congress's purposes in enacting original ERISA legislation).

88. *See Register*, 477 F.3d at 68, 70-72 (discussing Congress's intentions in ERISA anti-age-discrimination and anti-backloading provisions and effect of that intention on cash balance pension plans). The proposed regulations that had been withdrawn by the time the court decided *Register*, as well as the Pension Protection Act of 2006, supported the court's conclusions regarding congressional intent. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 701 (codified as amended at 29 U.S.C. § 1054(b) (2006)) (revising ERISA's rules regarding age discrimination to take into account cash balance pension plans); KRASS, *supra* note 86, at 9-33 to 9-36 (discussing proposed regulations, which prohibited deliberate and dramatic discrimination by employers through allocation of contributions and interest credits).

89. *See Register*, 477 F.3d at 68 (agreeing with Seventh Circuit's *Cooper* opinion, which interpreted applicable ERISA provisions regulating employer inputs).

90. *See id.* at 67-68 (citing Third Circuit and Supreme Court precedent that suggests that courts look to practical impact to interpret ERISA). For a discussion of the precedent cited by the court and its practical impact as perceived by the court in the dispute before it, see *supra* notes 42-43 and accompanying text.

91. *See Register*, 477 F.3d at 64 ("[W]e agree [with the district court] that appellants' argument, if accepted, would mean 'that all cash balance plans' violate . . . ERISA . . . ." (quoting Register v. PNC Fin. Servs. Group, Inc., 36 Employee Benefits Cas. (BNA) 1321 (E.D. Pa. Nov. 21, 2005))).

92. *See id.* at 66-68 (discussing cash balance pension plans, possible purposes of employers in starting hybrid pension system and relationship between cash balance plans and two traditional forms of plan).

93. *See id.* at 67 (finding that interpretation of statute must "'not lead to injustice and oppression,'" nor lead to "'unreasonable results'" (quoting Evcco Leasing Corp. v. Ace Trucking Co., 828 F.2d 188, 195 (3d Cir. 1987))); Am. Tobacco Co. v.

ple points in its decision, the court noted that cash balance plans, although defined benefit plans under law, are in many ways like defined contribution plans.[94] The court also noted the prevalence of cash balance plans and the possibility of rendering all of them illegal.[95] Finally, echoing the Seventh Circuit in *Cooper*, the *Register* court found that any discrimination that occurred as a result of cash balance plans was the result of the time value of money, not employers' deliberate actions.[96] Finding such a practical impact impermissible, the court reasoned, would be unreasonable.[97]

3. *Preserving Flexibility for Employers*

In *Register*, the Third Circuit also attempted to reach a decision that preserved a degree of flexibility for employers to structure employee pension plans.[98] The court did not hold that employers have complete autonomy to organize and maintain their plans.[99] In fact, as the court noted, employers are subject to specific and exacting rules.[100] Like the Seventh Circuit, however, the court in *Register* concluded that although these rules provide statutory guidance, they cannot frustrate every innovation employers might conceive of to structure their pension plans.[101]

Patterson, 456 U.S. 63, 71 (1982) (requiring that federal courts seek to interpret statutes reasonably, in light of facts and other sections of statutory scheme).

94. *See Register*, 477 F.3d at 62-69 (noting hybrid nature of cash balance pension plans despite their legal classification as defined benefit plans).

95. *See id.* at 64 n.5 (agreeing with district court that decision against pension plan would render all cash balance plans illegal under ERISA, and agreeing with appellees that accordingly, "much is at stake"); *see also* RIA'S COMPLETE ANALYSIS OF THE PENSION PROTECTION ACT OF 2006 22-23 (2006) (explaining that application of ERISA provisions in existence before Pension Protection Act of 2006 could render traditional cash balance pension plans impermissible).

96. *See Register*, 477 F.3d at 66, 69 ("Treating the time value of money as a form of discrimination is not sensible." (quoting Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 639 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1143 (2007))).

97. *See id.* at 67 (determining that Third Circuit and Supreme Court precedent require "reasonable" and just ruling given possible practical impact).

98. *See id.* at 69 (finding congressional intent to permit employers to provide young workers with incentive through accrual of interest credits); *see also Cooper*, 457 F.3d at 642-43 (finding private sphere better regulator of cash balance plans' interest credits than judiciary).

99. *See, e.g., Register*, 477 F.3d at 68 (finding all employers prohibited from making allocations of benefits based on age, regardless of form of pension plan).

100. *See id.* at 70-71 (interpreting ERISA anti-backloading rules, which prohibit amendments that increase employer inputs by more than 133 1/3% over previous year); *see also* 29 U.S.C. § 1054(b)(1)(A) (2006) (prohibiting annual raise in benefit accrual over certain percentages).

101. *See Cooper*, 457 F.3d at 642-43 (finding flexibility within private sector necessary in pension planning); *Register*, 477 F.3d at 68 ("[W]e do not believe that a cash balance plan's technical classification as a defined benefit plan compels us to disregard this critical distinction and thereby unreasonably interfere with employers in the crafting of pension plans.").

The *Register* court carefully delineated the ERISA provision that affected the litigation at hand.[102] The court noted that the statute's anti-age discrimination rule might have profound consequences.[103] In the eyes of the court, however, this prohibition did not bar employers from exploring new alternatives to pension planning.[104] Instead, the court considered employer flexibility to be important in a field that has evolved more quickly than the applicable regulating statute; accordingly, the court preserved a degree of autonomy for private actors.[105] In reaching its decision, the Third Circuit relied heavily on the Seventh Circuit's analysis in *Cooper* and invoked a clear statement of employer autonomy in the field of pension planning.[106]

In conclusion, to resolve disputes between ERISA and cash balance plans, practitioners before the Third Circuit should employ the *Register* court's three-facet analysis as discussed in this section.[107] First, attorneys will be best able to prevail by showing that one side of a dispute favors the congressional intent of fairness and flexibility in pension planning.[108] Additionally, this intention should illustrate, within the context of the broader regulatory scheme, a "reasonable" practical impact on the market for privately administered pension plans, and should also preserve a degree of flexibility for employers to modify their plans over time.[109] Practitioners who are able to integrate their position into this three-facet framework are likely to be successful when confronted with this type of conflict before the Third Circuit.[110] As discussed in the forthcoming sec-

102. *See Register*, 477 F.3d at 63-65 (discussing "competing positions" regarding applicable provisions of ERISA).

103. *See id.* at 64 & n.5 (noting possibly profound effect of decision against cash balance pension plan).

104. *See id.* at 68 (finding flexibility in prohibitions and, ultimately, that ERISA provisions do not apply to interest credits of cash balance pension plans).

105. *See id.* at 63 (noting that Congress enacted ERISA before development of cash balance pension plans); *see also* Eaton v. Onan Corp., 117 F. Supp. 2d 812, 818 (S.D. Ind. 2000) (describing enactment of ERISA and subsequent development of cash balance pension plans in 1980s); Kozak & Waldbeser, *supra* note 6, at 868 (discussing development and growth of cash balance plan in 1980s and 1990s).

106. *See, e.g., Register*, 477 F.3d at 68, 69 (referencing Seventh Circuit's *Cooper* analysis regarding congressional intent, practical impact of issue and need to preserve flexibility for employers); *see also Cooper*, 457 F.3d at 642 (discussing need to preserve employers' flexibility in enacting and changing employees' pension plans).

107. *See* Kozak & Waldbeser, *supra* note 6, at 886-88 (discussing *Register* as having established framework for addressing applicability of ERISA to cash balance pension plans). For a discussion of the facets of this analytical framework, see *supra* notes 80-106, *infra* notes 108-12 and accompanying text.

108. *See Register*, 477 F.3d at 67 (interpreting Third Circuit and Supreme Court precedent to require reading of statute that both enforced congressional intent and preserved justice and reasonability).

109. *See id.* at 67-68 (using three facets to discern just reading of ERISA, in line with congressional intent, as applied to cash balance pension plans).

110. *See id.* (ruling in favor of pension plan, as when appellants were able to frame issue satisfying three facets of Third Circuit's analytical framework).

tion, in light of recent congressional action attempting to resolve disputes between ERISA and cash balance plans, the *Register* framework is particularly useful when it comes time to address many of the questions left unanswered by this new legislation.[111]

IV. IMPACT: *REGISTER* AND THE PENSION PROTECTION ACT OF 2006

With the Pension Protection Act of 2006 (the Act), Congress offered its own remedy to the cash-balance controversy faced by the Third Circuit in *Register*.[112] When passing legislation to regulate pensions created after June 2005, Congress adopted an approach similar to that of the Third Circuit in *Register*.[113] ERISA now permits the creation of cash balance

111. *See* Kozak & Waldbeser, *supra* note 6, at 891-98 (discussing questions left unanswered by recent congressional legislation intended to resolve disputed application of ERISA to cash balance pension plans). For a discussion of recent congressional action affecting this debate and the implications *Register* may have on litigation under this legislation, see *infra* notes 113-31 and accompanying text.

112. *See* Kozak & Waldbeser, *supra* note 6, at 868, 891-98 (noting enactment of recent pension legislation and implications for future litigation); *see also* Pension Protection Act of 2006, Pub. L. No. 109-280, § 701 (codified as amended at 29 U.S.C. § 1054(b) (2006)) (revising ERISA's rules regarding age discrimination to take into account cash balance pension plans); RIA's COMPLETE ANALYSIS OF THE PENSION PROTECTION ACT OF 2006, *supra* note 95, at 24-25 (explaining Pension Protection Act innovations affecting cash balance pension plans). The *Register* court noted the Pension Protection Act of 2006 and summarized its impact on the controversy before it:

> [The Act] provides that the accrued benefit for the purposes of cash balance plans may be expressed as the balance of a hypothetical account and significantly modified the application of the ERISA anti-discrimination provisions to cash balance plans . . . . However, [the Act] specifically indicates that nothing in the amendments "shall be construed to create an inference" with respect to the ERISA's defined benefit plan anti-discrimination provision . . . "as in effect before such amendments."

Register, 477 F.3d at 65 n.8 (quoting Pension Protection Act § 701) (noting lack of authority to apply recent additions to federal pension law in case before it). The Pension Protection Act, therefore, affects cash balance plans that have come into existence after June 29, 2005, and is expressly barred from being used as persuasive authority in cases concerning pre-existing cash balance plans. *See id.* (discussing provisions of Pension Protection Act that limit its applicability); Kozak & Waldbeser, *supra* note 6, at 893 (discussing application of Pension Protection Act to cash balance plans that came into existence after June 29, 2005).

113. *See* Pension Protection Act § 701 (providing anti-age-discrimination rules for employers providing cash balance pension plans for employees). Though the Act does not answer the *Register* court's ultimate question regarding the definition of "benefit accrual," it does provide another means for policing cash balance accounts with goals similar to those of the court in mind. *See Register*, 477 F.3d at 65 n.8 (noting Act and discussing its impact on controversy before court). Under the new legislation, the benefits accrued in the hypothetical accounts of similarly situated employees may not vary based on employees' ages. *See* Pension Protection Act § 701 (providing guidelines regarding age discrimination in cash balance pension plans); J. COMM. ON TAXATION, TECHNICAL EXPLANATION OF H.R. 4, THE "PENSION PROTECTION ACT OF 2006," AS PASSED BY THE HOUSE ON JULY 28, 2006, AND AS CONSIDERED BY THE SENATE ON AUGUST 3, 2006, 154-55 (2006), *available at* http://www.house.gov/jct/x-38-06.pdf [hereinafter JOINT COMMITTEE ON TAXATION] (explain-

plans.[114] Additionally, the amended statute allows the benefits of those enrolled in defined benefit plans to be calculated based on terms of service and age.[115] Although Congress intended the statute to address the same controversy at issue in *Register*, cases involving ERISA's rules will not cease.[116] Congress did not prescribe a method for courts to address plans already in existence, nor did it answer many of the pertinent questions that arise when applying ERISA to cash balance pensions.[117] As such, the Act sets the stage for the next round of controversies; in such an environment, an understanding of *Register* will be crucial.[118]

In 2006, after cases such as *Register* had confronted the federal judiciary, Congress attempted to solve the problems created by applying ERISA to cash balance pension plans through the Act.[119] The Act was primarily aimed at solving other problems faced by employees in the modern pension environment. Nevertheless, the Act's practical effect is to set new rules for cash balance pension plans.[120] In particular, the Act provides that in cash balance plans, age discrimination under ERISA is determined by examining employer input and the rates of return on interest credits relative to market rates and prescribed benchmarks.[121]

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ing provisions of Act as applied to cash balance plans). The Act also polices interest credits by relating permissible rates of return to a market rate calculated by the Secretary of the Treasury. *See id.* (explaining provisions of Act regarding interest credits in cash balance pension plan); RIA'S COMPLETE ANALYSIS OF THE PENSION PROTECTION ACT OF 2006, *supra* note 95, at 24-25 (same).

114. *See* Pension Protection Act § 701 (changing federal law to allow for accrual of interest credits in private pension plan, but limiting degree to which such credits may disproportionately favor younger workers).

115. *See* JOINT COMMITTEE ON TAXATION, *supra* note 113, at 154-55 (explaining provisions of Act).

116. *See Register*, 477 F.3d at 65 n.8 (explaining Act's potential lack of authority in cases involving cash balance pension plans that were in existence before June 29, 2005); Kozak & Waldbeser, *supra* note 6, at 893 (discussing authority of Act in cases concerning pension plans in existence before and after June 29, 2005).

117. *See* Kozak & Waldbeser, *supra* note 6, at 891, 893-98 (discussing Act and issues that may arise in future pension-related litigation in federal courts).

118. *See id.* at 893-98 (describing landscape in which future litigation concerning ERISA and cash balance pension plans will be fought).

119. *See* JOINT COMMITTEE ON TAXATION, *supra* note 113, at 150-52 (discussing recent litigation concerning ERISA and cash balance pension plans and addressing state of law prior to Pension Protection Act); *see also* Kozak & Waldbeser, *supra* note 6, at 893-98 (discussing various issues settled and left unresolved by Pension Protection Act).

120. *See generally* Pension Protection Act of 2006, Pub. L. No. 109-280 (2006) (providing, *inter alia*, for new minimum funding standards for defined benefit plans and rules for establishment and maintenance of pensions funded by multiple employers); *see also* Pension Protection Act of 2006, Pub. L. No. 109-280, § 701 (codified as amended at 29 U.S.C. § 1054(b) (2006)) (prohibiting age discrimination in hybrid pension plans by requiring equity in benefit accrual and placing limits on permissible interest rates for interest credits).

121. *See* Pension Protection Act § 701 (providing new rules to prevent age discrimination in cash balance pension plans).

These and other changes to pension law contained within the Act, however, do not resolve every incongruity between ERISA and cash balance pensions.[122] The anti-backloading provision of ERISA—which the *Register* court attempted to interpret—is not affected by the new legislation. In addition, commentators point out that other issues not fully addressed by the Act include "wearaway"—the reduction of funds due to conversion to a cash balance plan from a traditional form of plan, and "whipsaw"—a reduction in funds through conversion of an annuity to a lump sum amount.[123] Moreover, a majority of the Act's innovations apply only prospectively, and function merely as persuasive authority in cases involving cash balance plans created before June 2005.[124]

Following the passage of the Act, understanding the Third Circuit's *Register* framework is particularly important to practitioners dealing with ERISA and cash balance pension plans.[125] In *Register*, the Third Circuit relied upon the broad goals discernable through ERISA's entire statutory scheme, the practical impact of proposed solutions and the need for flexi-

122. *See* Kozak & Waldbeser, *supra* note 6, at 891-98 (discussing issues not resolved by Pension Protection Act of 2006).

123. *See* 26 U.S.C. §§ 411(b)(5)(B)(i), (iii) (2006) (reflecting changes in pension law made by Pension Protection Act); Kozak & Waldbeser, *supra* note 6, at 894-98 (discussing effect of Act on issues of wearaway and whipsaw). Essentially, the prospective rules regarding whipsaw and wearaway require employers to pay employees in such a way that employees do not receive less than the accrued benefit within their hypothetical accounts at the time of their retirement—including both employer contributions and interest credits, as regulated by Treasury Department benchmarks. *See* JOINT COMMITTEE ON TAXATION, *supra* note 113, at 156-57 (explaining effect of Act on issues of wearaway and whipsaw).

The Second Circuit confronted the issue of whipsaw in *Esden*. *See* Esden v. Bank of Boston, 229 F.3d 154, 158-59 (2d Cir. 2000) (determining that in order to prevent whipsaw through conversion of plan, ERISA provisions should be read strictly as applied to cash balance pension plan). *See generally* Berger v. Xerox Corp. Ret. Income Guar. Plan, 338 F.3d 755 (7th Cir. 2003) (addressing whipsaw issue in manner similar to that of *Esden*); Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan, 221 F.3d 1235 (11th Cir. 2000) (same), *remanded to* 196 F. Supp. 2d 1260 (N.D. Ga. 2002). In *Esden*, the court interpreted the "rigidly binary" nature of pension regulations as well as relevant agency determinations to require a strict reading of ERISA defined benefit plan rules. *See Esden*, 229 F.3d at 158-59 (announcing decision of court concerning whipsaw). For a discussion of *Esden* and its impact on courts interpreting the meaning of "benefit accrual" within ERISA's anti-age-discrimination prohibitions, see *supra* notes 46-54 and accompanying text.

124. *See* 26 U.S.C. §§ 411(b)(5)(B)(i), (iii) (2006) (providing only for prospective enforcement); Kozak & Waldbeser, *supra* note 6, at 895, 897 (discussing effective dates of innovations to pension law).

125. *See* Kozak & Waldbeser, *supra* note 6, at 894-98 (discussing impact of Pension Protection Act of 2006 and explaining context in which future ERISA litigation may take place).

bility for employers.[126] Given Congress's newest mandates, the nature of the overall statutory scheme and the pension industry have changed.[127]

Further, although the Act focuses on employee security, employer flexibility has been maintained in many instances.[128] *Register* suggests that advocates should take note of these developments and use them to craft arguments to satisfy the *Register* three-facet analysis.[129] In future pension litigation, successful arguments under either the new statutory provisions of pension law or its unaffected areas will demonstrate that particular positions satisfy the broader statutory scheme, lead to just and reasonable results and preserve a necessary degree of flexibility.[130]

V. CONCLUSION

In *Register*, the Third Circuit demonstrated its preferred mode of analysis in cases concerning ERISA and cash balance pensions.[131] Confronting an issue debated throughout the federal judiciary, the court agreed with the Seventh Circuit and found cash balance plans permissible despite their hybrid nature.[132] In doing so, the court chose to interpret ERISA broadly, by looking to the statutory context of ERISA, the practical impact of cash balance plans and employer flexibility to finance such plans.[133] As a result, the court simultaneously permitted cash balance

126. *See* Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 64-68 (3d Cir. 2007) (employing three-faceted approach for applying ERISA to cash balance pension plan). For a discussion of these three facets in the court's *Register* analysis, see *supra* notes 80-112 and accompanying text.

127. *See* Kozak & Waldbeser, *supra* note 6, at 891-98 (discussing provisions of Pension Protection Act of 2006 and possible impact on future pension planning and potential litigation).

128. *See generally* Pension Protection Act of 2006, Pub. L. No. 109-280 (2006) (providing for, *inter alia*, new minimum funding standards and new standards for maintenance of cash balance pension plans).

129. *See* Kozak & Waldbeser, *supra* note 6, at 894-98 (discussing context and issues for future ERISA cases involving cash balance pension plans).

130. *See Register*, 477 F.3d at 67-69 (interpreting precedent to require court to employ analysis appealing to statutory context, practical consequence and employer flexibility).

131. *See id.* at 64, 66-69 (discussing factors court considered in finding ERISA to permit use of cash balance pension plans). For a discussion of the facets of the Third Circuit's preferred analysis in cases concerning ERISA and cash balance pension plans, see *supra* notes 64-112 and accompanying text.

132. *Compare* Esden v. Bank of Boston, 229 F.3d 154, 158-59 (2d Cir. 2000) (finding ERISA rules apply to cash balance plan in same way that they apply to defined benefit plan), *with* Cooper v. IBM Pers. Pension Plans, 457 F.3d 637, 642 (7th Cir. 2006) (enforcing court's interpretation of ERISA's goals without restricting employer's use of cash balance pension plan), *cert. denied*, 127 S. Ct. 1143 (2007). For a discussion of how the hybrid nature of these plans poses a difficulty to courts attempting to apply ERISA's anti-age-discrimination and anti-backloading provisions, as well as solutions offered by various federal courts, see *supra* notes 2-63 and accompanying text.

133. *See Register*, 477 F.3d at 64-69 (finding cash balance plan permissible under ERISA). For a discussion of the Third Circuit's analysis of congressional

pensions to exist and set the stage for future litigation.[134] In the future, practitioners involved in ERISA-related cash balance plan disputes should emphasize how their arguments satisfy the three facets set forth by the *Register* court.[135] In the wake of *Register*, Congress offered its own solutions to the controversy by passing the Pension Protection Act of 2006.[136] This legislation, however, left several important questions concerning ERISA and the increasingly popular cash balance pensions unanswered.[137] When these questions lead to litigation in the Third Circuit, *Register* will serve as a useful guide for practitioners as they address the next phase of ERISA-related controversies.[138]

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intent, practical impact and maintenance of employer flexibility in *Register*, see *supra* notes 80-112 and accompanying text.

134. *See* Kozak & Waldbeser, *supra* note 6, at 886-88 (discussing *Register* and potential for case to serve as framework for future decisions). For a discussion of *Register*'s impact on future cash balance litigation, see *supra* notes 80-112 and accompanying text.

135. *See Register*, 477 F.3d at 64-69 (employing three-faceted method of analysis to interpret ERISA as applied to cash balance pension plan). For suggestions to practitioners, derived from the Third Circuit's *Register* analysis, see *supra* notes 108-12 and accompanying text.

136. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 701 (codified as amended at 29 U.S.C. § 1054(b) (2006)) (providing new rules that bar age discrimination in cash balance pension plans). For a discussion of the relevant provisions of the Pension Protection Act of 2006, see *supra* notes 113-22 and accompanying text.

137. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 701 (codified as amended at 29 U.S.C. § 1054(b) (2006)) (applying rules only to pension created after June 2005). For a discussion of the questions left unanswered by Congress in the Pension Protection Act of 2006, see *supra* notes 122-25 and accompanying text.

138. *See Register*, 477 F.3d at 64-69 (providing template for analysis of future cases concerning ERISA). For a discussion of how practitioners may best employ the court's *Register* analysis to succeed in cases subsequent to the Pension Protection Act of 2006, see *supra* notes 126-31 and accompanying text.